JUN 11 1951

CHARLES ELMORE CROPLEY
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1950

No. 114

WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY (Trustee),
Petitioners,

v.

ROSS ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARTHUR G. CONNOLLY,
Counsel for Petitioners

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 21, 1951 (Petition for Rehearing denied March 15, 1951).

Ten copies of the record, one of which is certified, printed as a joint appendix to the briefs for use in the court below, together with the proceedings and opinions in that court are furnished herewith in accordance with Rule 38 of the rules of this Court. In addition, ten copies of a stipulated Exhibit Book and specimens of the devices in issue have been filed with the clerk.

Opinions Below

The opinion of the District Court (R. 6-30) is reported in 81 F. Supp. 511 (E. D. N. Y., 1948). The opinion of the Court of Appeals (R. 215-274) is reported in 187 F. 2d 277.

Jurisdiction

The judgment of the Court of Appeals was entered February 21, 1951. The order denying a timely Petition for Rehearing filed March 8, 1951 was entered on March 15, 1951 (R. 280). The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1254(1) and 2101(c).

Question Presented

The sole question presented is whether it is contrary to patent law and paramount public interest to strike down—for asserted lack of invention—a patent for an ingenious new product, nowhere disclosed or suggested in the prior art, that has—

> (a) literally created an important and fast-growing new business,
>
> (b) forced the most powerful competitor to copy the patented product and abandon the cumbersome and inferior prior art device, with which that competitor had earlier dominated the market, and
>
> (c) provided the public with a cheap and efficient device that has not only satisfied an old and recognized want but opened up extensive new fields of popular utility.

The question is of immediate importance to forestall destruction of confidence in the patent laws as an effective instrument for promoting competition and the useful arts by encouraging and protecting new enterprises built on ingenuity and merit. An affirmative application of the con-

stitutional standard of invention is sorely needed to check the apparently growing feeling on the part of the lower courts that none but the most extraordinary inventions can meet that standard.

Summary and Short Statement of the Matter Involved

The patent in suit is for the now familiar photoflash lamp characterized by a filling of gossamer fluff made of almost invisibly fine wire supported elastically within the bulb by the curls and loops of wire touching the glass.[1]

The District Court (Judge Galston) held the Korver product patent in suit No. 2,162,847 valid over the prior art and infringed as to all three claims by the photoflash lamps manufactured by the respondent General Electric Company and sold by that company and by respondent Ross Electric Corporation.[2]

The Court of Appeals, Judge Chase dissenting, reversed on the question of validity.

The facts are fully set forth in the opinion of Judge Chase (R. 217-235), who confirmed the findings of fact of the District Court and concluded therefrom that the decision of the District Court should be affirmed. Judges A. N. Hand and Frank accepted all of the facts as stated by Judge Chase (R. 216, 236) but decided that the patent was invalid for lack of invention. The only difference between the

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[1] Specimens of petitioner's patented photoflash lamps (Pltfs' Ex. 4) and the General Electric Company's accused lamps (Pltfs' Ex. 25) have been supplied to the clerk for distribution to the justices. These specimens, when held between the eye and the window, show better than any photograph the character of the filling material in question.

[2] A second Korver patent No. 2,113,423 directed to an automatic method for manufacturing photoflash lamps was held by the District Court to be valid but not infringed. The Petition at bar is not concerned with this patent.

judges is one of law—in applying a different "standard of invention" to the same set of facts.

The only commercial photoflash lamp known prior to the invention in suit was the now obsolete aluminum foil lamp made under Ostermeier patent No. 1,776,637 and sold by the respondent General Electric Company between 1930 and the early 1940's (R. 32).[3] In 1937 petitioner's predecessor commenced the manufacture of the new photoflash lamp filled with skeleton-like gossamer wire fluff, as illustrated and described in the Korver patents (then pending as applications) under which it had acquired an exclusive license (R. 32-33). It was a complete newcomer in this field, yet within one year its sales of photoflash lamps, built in exact accordance with the disclosure of the Korver product patent at bar, exceeded the sales of the aluminum foil lamps made by the General Electric Company (R. 28). By 1941 the sales of Wabash lamps had risen to about 17 million per annum, more than four times the maximum sales of the General Electric foil lamps (R. 33). About 1940 the General Electric Company commenced the manufacture of its infringing wire lamps (R. 28). Within a year its sales of those lamps far exceeded its sales of the aluminum foil lamps and the latter were shortly abandoned (R. 28). Since the War petitioner's sales of its patented lamps and the respondents' sales of the infringing lamps have increased rapidly so that by the time of the trial in 1948 the petitioner's sales amounted to over 70 million lamps annually and the respondents' sales to nearly 60 million lamps annually (see Sales Chart, Petitioners' Ex. 28-13 annexed to this Petition).

In his statement of facts, accepted by the other Circuit Judges, Judge Chase said (R. 232-3):

> "Korver was the first to create a flash lamp with a filler uniformly distributed and held in place within

[3] The Ostermeier patent was held valid and infringed in *General Electric Company* v. *Munder Electrical Company et al.* (D. Mass. 1938), 22 F. Supp. 291.

> the bulb so that the output of actinic light was more easily coordinated with the camera and more useful for photographic purposes."

and at R. 231:

> "As the trial court found from ample evidence:
>
> > 'The lamps manufactured by Wabash embodying the Korver patented product are cheaper, smaller, more uniform and more efficient than any photoflash lamps previously made. They have a light curve which differs from that of the foil lamp in having a lower, broader peak, more like a plateau, so that the difficult problem of synchronization with the camera shutter is largely avoided.'
>
> The only lamp which, before the patented lamp, was commercially successful was the foil filled one of Ostermeier, which the Korver lamp pushed off the market."

and at R. 233:

> "It was shown that when the defendant's Ostermeier flash lamp was unable to meet successfully the competition of the patented lamp, the defendant cast about for something that would, and eventually turned up the accused lamps which, being able to do so, have been sold over the succeeding years in about the same quantity as the patented ones."

And finally at R. 235:

> "In every particular referred to in the claims, the structure of the accused lamps is the same as or the substantial equivalent of that described and claimed in the Korver product patent."

Thus by the use of the patented invention a small company, which had never been in the business before (R. 39-40), created a great industry and by the sheer merit of its patented product forced the entrenched and established competitor to abandon its earlier product and to copy the plaintiffs' product.

The only basis given in the opinion of the court below for the conclusion that the product patent is invalid is in the following sentences, per Judge Hand (R. 216):

> "Judge Frank and I have been unable to discover any patentable invention in the plaintiffs' product. The Ostermeier, vanLiempt and Crowley patents taught the art enough to defeat the claims of the product patent relied on. In the first, a metallic foil was used; in the second, a metallic wire; and in the third, metallic wool. The only thing that remained was to fill the entire bulb with the wire for, given that, the filling would normally be undulating, serpentine and elastic."

The failure of these prior patents to teach the invention of the Korver patent with its skeleton-like fluff of fine wire elastically supported from the walls of the bulb in uniform spacial distribution is shown in Judge Chase' opinion (R. 231-3) and Judge Galston's opinion and findings of fact (R. 20-23 and 36), the latter being based upon testimony developed at the trial, documents and physical exhibits introduced and explained at the trial, and demonstrations conducted at the trial.

Specification of Errors

The Court of Appeals erred in finding no patentable invention in the product patent in suit and in failing to find it valid.

Reasons for Granting the Writ

1. The Korver photoflash lamp at bar is a classic example of the type of invention or discovery which it is the purpose of the constitutional provision and the patent laws to protect.[4]

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[4] Constitution, Art. 1, sec. 8; 35 U. S. C. 33, R. S. § 4888; 35 U. S. C. 31, R. S. § 4886, 35 U. S. C. 40, R. S. § 4884,—all reprinted in Appendix, pp. 11 and 12.

The patent system is the sword and buckler of little business against big. It is of vital importance to the public that the standard of invention required to support a valid patent be not put beyond reach. If that standard is made so high that only rare genius or the work of highly organized research experts can achieve it, the salutary purpose of the constitutional provision and of the patent statutes will be defeated. *Little business will be at the mercy of powerful competitors.* The incentive to disclose important inventions and to venture capital in their exploitation will be largely destroyed.

The patent at bar exactly fits the pattern that the law is designed to protect. It discloses fully and clearly the new product together with a practical and effective method of making it. Photographers and camera users the country over are daily testifying to its utility. It has met the severe test of invention laid down in the concurring opinion in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, at p. 155:

> "An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls recognize it as an advance."

Where can one look for greater masters in this scientific field than to the experts of the General Electric Company—whose attention to the problem, at the very time in question, is demonstrated by their contemporaneous patents?[5] Those masters recognized in the hard way the quality and distinction of Korver's advance. They tested and discarded their own best efforts and in the end followed Korver's solution, as held by all the Judges below. More important in the public interest, the invention has literally created a

[5] See Cartun patent No. 2,136,234 and Pipkin patent No. 2,142,372, both applied for in 1937, Petitioners' Exhibit Book pages 14 and 19.

new business of its own completely outstripping the old foil lamp business of the General Electric Company.

To defeat such a patent is contrary to the public interest.

2. The recent decisions of this Court on the standard of invention in patent cases have stampeded the lower courts into requiring a standard so high as to threaten the beneficial purposes of the law.[6] It is time that this Court intervene to clarify the misapprehension in the court below.

The District Judge, after hearing the evidence, wrote an able and painstaking opinion and findings of fact supporting his conclusion that the product patent is valid (R. 19-28, 35-6).

Judge Chase independently wrote a carefully considered opinion affirming that conclusion (R. 229-233).

Judge Hand wrote but eight lines on the subject (R. 216), which we have quoted at page 6 above. He did not find any suggestion in the prior art that would lead to the gossamer skeleton-like mass of thin wire elastically supported from the walls of the lamp in uniform spacial distribution. He referred to the Ostermeier patent (Petitioners' Exhibit Book, page 11), which shows the abandoned foil lamp. He referred to the vanLiempt patent (Peti-

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[6] In one day, April 30, 1951, the Court of Appeals for the Second Circuit handed down three patent decisions, in each case dismissing the complaint and in two of the cases reversing decisions of the district courts that had held the patents valid. See *Killian* v. *Allied Latex Corp.*, F. 2d (89 U. S. P. Q. 212); *Lenox* v. *Landers*, F. 2d (89 U. S. P. Q. 227); and *Youngs Rubber Corp.* v. *Allied Latex Corp.*, F. 2d (89 U. S. P. Q. 223). In his opinion in the last named case, Judge Clark said:

> "Undoubtedly this would have been held invention in times past, but now the climate of opinion has changed. . . ." citing Jungerson *v.* Ostby & Barlow Co., 335 U. S. 560; Sinclair & Carroll Co. *v.* Interchemical Corp., 325 U. S. 327; Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Co., 340 U. S. 147; and Crest Specialty *v.* Trager, U. S. (89 U. S. P. Q. 175).

tioners' Ex. Book, p. 44), which shows a "clew" of wire carried by the igniter, which has none of the essential elements of the claims in suit and will not give the same results as the Korver lamp (R. 26-7, 36, 231-2), and which proved a failure (R. 21, 66). He referred to the Crowley British patents (Petitioners' Ex. Book, pp. 33 and 44), which have nothing but a vague description and illustration of some kind of lamp filling with no indication that it is in any way related to the Korver filling. Judge Hand assumed, contrary to the Findings of Fact below,[7] that the invention consisted in merely filling the entire bulb with wire and that if this were done "the filling would normally be undulating, serpentine and elastic." There is no warrant whatever for the assumption that merely filling the entire bulb with wire would give the gossamer skeleton-like fluff elastically supported in uniform spacial distribution from the walls of the bulb, which is the distinctive wire filling of the Korver patent, or that entirely filling the bulb with wire would necessarily mean that "the filling would normally be undulating, serpentine and elastic."

Judge Frank wrote only one line expressing his agreement with Judge Hand (R. 236) and then turned his attention elsewhere.

The case was argued in the Court of Appeals on October 10, 1950 but not decided till February 21, 1951. In the interval, on December 4, 1950, this Court handed down its decision in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147.

If it be true that Judge Hand or Judge Frank concluded therefrom that patents are now to be sustained only in rare cases of outstanding invention, we submit the Court

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[7] The District Court found (R. 36):

> "None of the prior patents teaches or discloses the distinctive wire filling of the Korver patent. . . . The Korver product supplied a long-felt want and constituted an ingenious advance over the prior art."

below misapprehended that decision and decided the question at bar in a way that is in conflict with applicable decisions of this Court. See *Expanded Metal Co.* v. *Bradford,* 214 U. S. 366, 387; *Diamond Rubber Co.* v. *Consolidated Tire Co.,* 220 U. S. 428, 434-6; *Eibel Process Co.* v. *Paper Co.,* 261 U. S. 45, 63; *Goodyear Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 278.

By reviewing the decision below this Court can clarify the law so that it will be administered by the lower courts to effect the sound economic purposes for which it was designed. Then when ingenuity and venture capital have combined to make available to the public a new product supplying a long-felt want—when they have indeed, as in the present case, erected a great industry where almost nothing existed before—they will receive the patent protection to which they are entitled under the proper constitutional standard. Otherwise, the beneficial effect of the patent laws as a spur to competition will be frustrated by misapprehensions derived by the lower courts from some of the language in the *Supermarket* case.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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ARTHUR G. CONNOLLY
Counsel for Petitioner, HARTFORD NATIONAL BANK & TRUST COMPANY.

Dated: June 11, 1951.

Appendix

THE CONSTITUTIONAL PROVISION

ART. 1, sec. 8. The Congress shall have power . . . To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

35 U. S. C. 31; R. S. 4886.

Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.

35 U. S. C. 33; R. S. 4888.

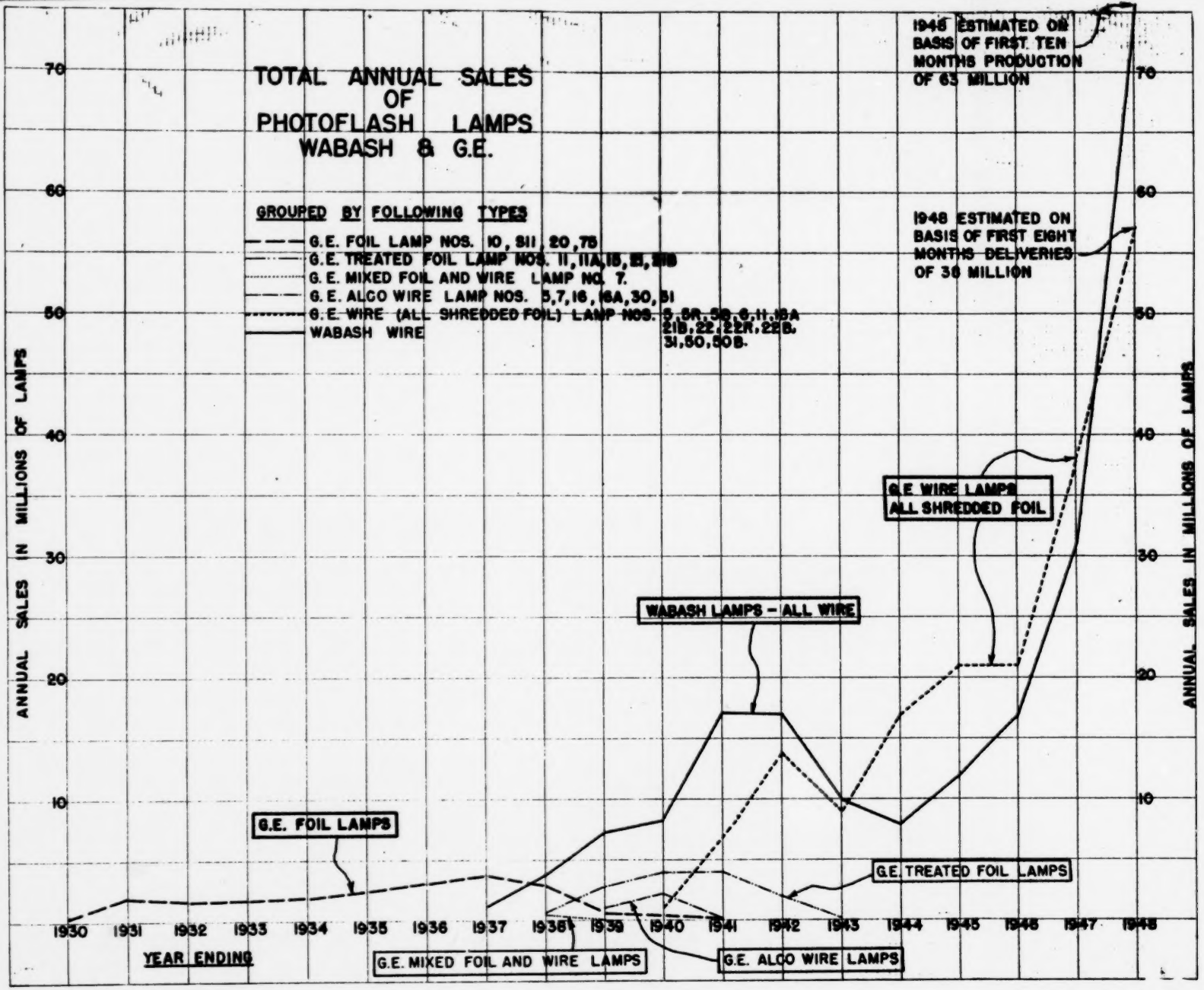
Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant

patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible.

35 U. S. C. 40; R. S. 4884.

Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery (including in the case of a plant patent the exclusive right to asexually reproduce the plant) throughout the United States and the Territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

EXH. 28-13


TOTAL ANNUAL SALES
OF
PHOTOFLASH LAMPS
WABASH & G.E.
GROUPED BY FOLLOWING TYPES
G.E. FOIL LAMP NOS. 10, 511, 20, 75
G.E. TREATED FOIL LAMP NOS. 11, 11A, 15, 21, 21B
G. E. MIXED FOIL AND WIRE LAMP NO. 7.
G. E. ALCO WIRE LAMP NOS. 5,7,16, 16A, 30, 31
G.E. WIRE (ALL SHREDDED FOIL) LAMP NOS. 9, 9R, 9B, 6, 11, 18A 21B, 22, 22R, 22B. 31, 50, 50B.
WABASH WIRE
1948 ESTIMATED ON BASIS OF FIRST TEN MONTHS PRODUCTION OF 63 MILLION
1948 ESTIMATED ON BASIS OF FIRST EIGHT MONTHS DELIVERIES OF 38 MILLION
G.E WIRE LAMPS ALL SHREDDED FOIL
WABASH LAMPS - ALL WIRE
G.E. FOIL LAMPS
G.E. TREATED FOIL LAMPS
G.E. MIXED FOIL AND WIRE LAMPS
G.E. ALCO WIRE LAMPS
ANNUAL SALES IN MILLIONS OF LAMPS
ANNUAL SALES IN MILLIONS OF LAMPS
0
10
20
30
40
50
60
70
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
YEAR ENDING